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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

Nos. 457 - 458

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GUS KOTTEAKOS and MICHAEL LEKACOS,

Petitioners,

—against—

UNITED STATES OF AMERICA.

NATHAN REGENBOGEN,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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HENRY G. SILVER,
HARRY SILVER,
With Him on the Petition.

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UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Gus Kotteakos, Michael Lekacos and Nathan Regenbogen, respectfully pray that writs of cer-

tiorari issue to review the judgments of the United States Circuit Court of Appeals, for the Second Circuit entered in these cases on August 7, 1945 (1300, 1301).[1]

Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, 28 U. S. C., Section 347(a), and by Sections 687, 688, Title 18, U. S. C., and the Rules of Criminal Procedure adopted thereunder, particularly Rule 11.

The Circuit Court of Appeals affirmed the judgments of conviction of the petitioners on August 7, 1945. Petitioners duly filed for a rehearing, which was denied on August 25, 1945. This petition is filed within thirty days from the date of the denial of the petitions for rehearing (1302, 1303, Rule XIII adopted under Section 723a, Title 28 U. S. C.).

In the Circuit Court of Appeals, petitioners Kotteakos and Lekacos appealed on a single typewritten transcript of the record, which was filed in this Court. Regenbogen's appeal was heard on the printed record, of which the requisite number were filed in this Court. The appeals of all three petitioners were argued at the same time, and the Circuit Court of Appeals rendered only one opinion, although two separate judgments were entered, one affirming the conviction of Kotteakos and Lekacos and the other affirming the conviction of Regenbogen (1300, 1301).

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1. All references unless otherwise stated in this petition and the accompanying brief are to pages of the Regenbogen record. All petitioners were tried together. The Regenbogen record contains all the testimony and every ruling required to determine the questions of law and fact raised in these applications.

Opinions Below

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals (L. Hand, Swan and A. N. Hand, Circuit Judges) has not yet been officially reported and is printed in the *Regenbogen* record at pages 1294 to 1300. Denial of rehearing was without opinion.

Statement of the Matter Involved

The judgments of the Circuit Court of Appeals sought to be reviewed, affirmed judgments convicting the petitioners of conspiring to make fraudulent applications for loans under the National Housing Act, contrary to Secs. 1702, 1703, 1715 and 1731 of Title 12, U. S. Code and Sect. 88 of Title 18 U. S. Code.

Although the indictment charged a single conspiracy beginning on or about "the first day of July, 1938" and continuing "up to and including the date of the filing" of the indictment (June 25, 1941) (2-3), the Circuit Court held that the proof showed the existence of at least "eight, and perhaps more" separate conspiracies (1295). There were thirty-two persons named as defendants in the indictment. Seventeen were tried after others had been eliminated by pleas of guilty, and dismissals. Of the seventeen tried, a mistrial was declared as to one, three were ordered acquitted by the Trial Court at the close of the Government's case, two were acquitted, the jury disagreed as to four, and the remaining seven were convicted, including the three petitioners. The Circuit Court further held that the rulings of the Trial Court admitting testimony concerning the deal-

ings between Brown[2] and the defendants in the case other than the petitioners was erroneous. The Circuit Court held that the Trial Court's charge was "plainly wrong" (1296) when it instructed the jury that "the indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Government would have to find, that each of the defendants was a member of the conspiracy. You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of the conspiracy" (1296, 1247).

The Circuit Court further held that the Trial Court was "apparently misled by an erroneous understanding by the rule that, when anyone joins an existing conspiracy, he takes it over as it is, and becomes a party to it in its earlier phases, and that the declarations of other conspirators, even though made before he has entered, are competent against him" (1296). The Circuit Court further held that the Trial Judge was "plainly wrong in supposing that upon the evidence there could be a single conspiracy, and in the view which he took of the law, he should have dismissed the indictment" (1296). The Circuit Court further held that even though petitioners knew that Brown was acting as a broker for the other defendants who were making similar false representations to the bank, was not enough to "make them [the petitioners] confederates with the other applicants; it did not give them [the petitioners] any interest in the success of any loans but their own; there was no interest, no venture, common to them and anyone else but Brown himself" (1297).

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2. Brown was the Government's principal witness. He was involved in every conspiracy. He had pleaded guilty before trial. The statement of facts in the brief in support of the petition and the opinion of the Circuit Court deal fully with his participation in the separate schemes.

The Circuit Court's opinion leads to the inevitable conclusion that the theory upon which the District Court tried the case and submitted the issues of fact to the jury was directly contrary to accepted principles of law. It similarly follows that the Trial Court's rulings in the admission of evidence and its instructions to the jury that the acts and declarations of any conspirator binds all (1249) was entirely wrong. Nevertheless, after stating these errors, the Circuit Court affirmed the judgments of conviction holding that the combination of all the errors was not sufficiently serious to affect the substantive rights of the petitioners. In this connection the Circuit Court held, and in our opinion erroneously, that it was entirely permissible to join many conspiracies in a single count, even though the defendants in each of the conspiracies were different and there was only one member common to all (1297-8).

Thus, the Trial Court's admitted erroneous holding that there was only one conspiracy even though the record established at least "eight, or perhaps more," taken in connection with the charge that the acts and declarations of one conspirator bound all, produced the unconscionable situation whereby these petitioners might have been found guilty by the jury upon proof of the commission of an overt act by another defendant in one of the other seven or more separate conspiracies. The evidence admitted against persons involved in conspiracies in which these petitioners had no connection or interest was of such character and submitted to the jury in such fashion as to predispose the jury to connect these petitioners with the other conspiracies. In this way, petitioners were severally deeply stained and impugned by evidence which the Circuit Court has held was legally incompetent as to them. The question is therefore squarely presented whether convictions obtained under the

aegis of a charge which authorized the conviction of a person upon proof of the commission of other crimes by other persons, must not be rejected out of regard for considerations which attain the constitutional level.

Questions Presented

1. Did the Circuit Court err in sustaining the conviction of the petitioners upon evidence showing as the Circuit Court found "at least eight, and perhaps more" separate conspiracies, as contrasted with the indictment's allegation of only a single conspiracy, where the Trial Court charged that only the conspiracy alleged had been proved and further charged that the acts and declarations of one conspirator bound all?

2. Where eight or more conspiracies are proved, although only one is charged in the indictment, does not the variance become prejudicial when the Trial Court denies the existence of variance and charges that the acts and declarations of one conspirator binds all?

3. Does not such variance become prejudicial where the Trial Court permits the jury to deal with the multiplicity of conspiracies as a single entity?

4. Does not a judge's charge which has the effect of authorizing a jury to convict a defendant shown to be involved in one conspiracy upon proof of the commission of an overt act in another conspiracy, deny due process of law to the defendant or otherwise constitute such fundamental error as to require reversal?

5. Did the Circuit Court err in reading the judge's charge as leaving to the jury to decide whether or not there was proof of a multiplicity of conspiracies or only a single conspiracy?

6. Does not the quantitative disparity between the one conspiracy charged and the eight or more proved, in itself constitute prejudice?

7. Did the Circuit Court err in holding (a) that the "several conspiracies" could have been joined in one indictment and (b) that several conspiracies with only one member common to all, could be properly joined?

8. Did the Circuit Court err, assuming that such joinder were proper, in holding that the situation created by the variance herein, is the same as though there had been such joinder?

9. Did the Circuit Court err in holding that the testimony of the chief government witness did not tend "even in the slightest way to implicate them [petitioners] in the other frauds or to predispose the jury to connect them with the other applicants", and that the "only indirect prejudice [petitioners] could have suffered because of the Trial Court's erroneous rulings and charge was "in case that the jury would be more ready to accept what he [Brown] said as to his dealings with them because of any testimony as to his dealings with other applicants"? (1299).

10. Did the Circuit Court err in disregarding these admitted errors of law, both in the admission of evidence and in the charge to the jury, especially since these errors were not technical in nature and did affect the substantial rights of the petitioners?

Reasons for Allowance of the Writs

1. The decision herein sustains a conviction under a charge which denied due process of law to the petitioners, or at the least constituted such fundamental error that it must not be permitted to stand.

2. The decision herein misconstrues this Court's decision in *Berger* v. *United States*, 295 U. S. 78, on the subject of variance.

3. This case represents the "different case" counseling a different decision which this Court foresaw in the *Berger* case (*supra*).

4. The decision herein on the subject of joinder of offenses is in conflict with this Court's decision in *McElroy* v. *United States*, 164 U. S. 76, 81.

5. The decision herein is at variance and in conflict with the decisions of the Fifth Circuit in *Todd* v. *United States*, 48 Fed. (2d) 530, and the holding of the Ninth Circuit in *Culjak* v. *United States*, 53 Fed. (2d) 554, as well as the Sixth Circuit in *Castellini* v. *United States*, 64 Fed. (2d) 636, 637, 638.

6. The Circuit Court's ruling in disregarding the errors of law committed by the Trial Court in the admission of evidence, and the charge to the jury, appears to be directly in conflict with *Bruno* v. *United States*, 308 U. S. 287, 293, 294; and *McCandless* v. *United States*, 298 U. S. 342, 347, 348.

WHEREFORE, petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Hon-

orable Court directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being the cases numbered and entitled in its docket as "*United States of America*, Appellee, v. *Michael Lekacos and Gus Kotteakos*, Appellants, No. 2, October Term, 1944," and "*United States of America*, Appellee, v. *Nathan Regenbogen*, Appellant, No. 302, October Term, 1944," and that the judgments of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated, September 24th, 1945.

GUS KOTTEAKOS
Petitioner

MICHAEL LEKACOS
Petitioner

NATHAN REGENBOGEN
Petitioner

BY JAMES I. CUFF,
Attorney for Petitioners.

HENRY G. SILVER,
HARRY SILVER,
With Him on the Petition.

Certificate of Counsel

I hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated, September 24th, 1945.

JAMES I. CUFF,
Attorney for the Petitioners and member of the bar of this Court.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

Nos. _____

GUS KOTTEAKOS and MICHAEL LEKACOS,

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—against—

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—against—

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Statutes Involved

The Federal Statutes involved are title 12 U. S. Code Sections 1702, 1703, 1715 and 1731 (National Housing Act), Title 18 U. S. Code Section 88 (conspiracy) and Title 28 U. S. Code Section 391.

Statement of Facts

The Indictment

The indictment charges a conspiracy to violate Title 12 U. S. Code, Sections 1702, 1703, 1715, 1731, in that the petitioners and others indicted with them agreed to obtain loans under Title 1, of the National Housing Act upon false and fraudulent representations and statements made in applications for such loans.

The Evidence

The testimony of Simon Brown, co-defendant who pleaded guilty to the indictment (356) constitutes the matrix of the case against the roster of 32 defendants of whom 17 were tried. Brown's testimony consists, essentially, of a narration of his career as a F. H. A. loan broker, in which the long list of co-defendants appear as clients or groups of clients who were willing to comply with Brown's illicit suggestions and hence shared his guilt in the individual transactions in which they happened to figure.

The testimony of Brown discloses some eight to ten groupings of transactions unrelated to each other (1295). Brown testified, seriatim (1) that defendant Secular had brought him about two dozen loans (359, 360), and shared his fee; (2) that he, Brown, had solicited applications from defendants Joseph Harris and Emmanuel Harris, who needed money to pay creditors (363, 364); (3) that he, Brown, had put through the Posner and Dworkin applications (369); (4) Brown testified concerning loans he obtained for petitioner Lekacos. The first was to enable Lekacos to obtain funds to open a law office (388). The second

involved an application in the names of Theodore Lekacos, the petitioner's brother, and the brother's wife, Clara. Petitioner Lekacos endorsed the check issued by the bank upon the loan, and when petitioner's right to use his brother's name was called in question, Theodore gave him a written power of attorney designed to attest to the fact that he was entitled to use his brother's name (384); Brown then testified respecting a third F. H. A. application forwarded by Lekacos and signed by defendant Gerakeris. Brown testified that defendant Gerakeris impersonated his brother in order to obtain the funds and that defendant Sadie Vendicos (who was acquitted) impersonated the wife of the brother of defendant Gerakeris (393). (5) Brown next turned to his dealings with defendants Mae Seklir and Pearl Seklir, originally forwarded through David Lapin (396). A second loan application came directly from Mae Seklir; next came an application from Max Slovin. At Brown's request Mae Seklir agreed to say that Slovin was employed by the concern in which he was interested. Brown got $1,000.00 out of the Seklir loan (536); (6) Another group of transactions put through by Brown were the loans he obtained on behalf of Hyman Litvin and Jacob Litvin (416). The Litvins in another instance signed the names of Rubin Smith and Ann Smith upon an application (427). Brown kept $1,000.00 out of a total of $2,500.00 for himself (428). (7) Brown's dealings with petitioner Kotteakos, where a loan was originally obtained for Kotteakos and followed by a loan made by Kotteakos, the proceeds of which went to Brown, for Brown's personal use and benefit (440); (8) The loan to petitioner Regenbogen, which was promptly repaid (453); (9) the Tierney and Sandes loans made through Brown, of which the proceeds is said to have gone to Kotteakos (454, 457). In this connection, an abortive

attempt was made to connect Regenbogen with the cashing of one of the checks representing the loans. Sandes and Tierney were never identified, and, as far as the record discloses, were non-existent. (10) The Wolf loan, not connected with any of the previous groups (865); (11) other loans were discussed by Brown not linked to any of these groups.

Brown's testimony thus demonstrated that the single all-inclusive conspiracy charged in the indictment did not in fact exist. Instead, there were some "eight, or perhaps more" unrelated conspiracies having only the activity of Brown in common. Any possibility of doubt on this subject was removed by the detailed cross-examination of Brown (561-565). On this subject the Circuit Court of Appeals said (1295):

> "These were the facts on which the three appellants were found guilty; but the evidence was not confined to their dealings with Brown; it covered similarly fraudulent applications of many of the other accused, who, as we have said, may be divided into at least eight, and perhaps more, separate and independent groups, none of which had any connection with any other, though all dealt independently with Brown as their agent. Nothing said by Brown about any of the other groups concerned the three appellants; and in this we include not only the acts which he imputed to the others, but any declarations which he put in their mouths."

Nevertheless, the existence of a thread of acquaintance leading in sequence from one to another through the roll of persons who were implicated with Brown in the individual transactions to which he testified, tended to predispose the jury to connect all the groups.

Examination of the testimony discloses that the evidence relevant to other crimes did in fact "deeply stain(s) and generally impugn(s)" the petitioners "as to give genuine plausibility to the chance of prejudice" (1299).

Brown first met Lekacos at a cafeteria being introduced by the defendant Mae Seklir (388). The Seklir women in turn had a place of business in the immediate vicinity of the cafeteria operated by Mrs. Vendicos, one of the co-defendants who was acquitted but whose name was brought into the case by Brown and Gerakeris (testimony of Brown, 393). It was in Mrs. Vendicos' cafeteria that Brown met Lekacos through Seklir. It was through Mrs. Vendicos and at her cafeteria that Lekacos met Gerakeris, and the means of obtaining the Gerakeris loan was discussed (302). Returning to the Seklirs, the record indicates that not only were their loans fraudulent, but that they had assisted Brown in connection with still another fraud, the Slovin loan (402, Government's Exhibit 23, reference to the Lustrite Corp.).

The Misses Seklir had met Brown through David Lapin, one of the co-defendants in this case, who pleaded guilty, and was ultimately sentenced to imprisonment by the trial judge. Lapin had brought "about a dozen" applications to Brown. It was through Lapin that the Litvin loan was made (416).

The Slovin referred to above was a brother-in-law of Brown's, and it was Brown who had asked Mae Seklir falsely to acknowledge that Slovin worked for the Lustrite Corp. in which Mae Seklir had an interest (402).

Petitioner Kotteakos met Brown through Lekacos, and the first Lekacos loan was made (439). Thereafter, Kotteakos and Brown became very friendly, and, to use Brown's language, Kotteakos took a second loan "for the sole benefit

of helping me out" (440, Government's Exhibit 8-D). It was through Kotteakos that Brown met petitioner Regenbogen (450).

Certainly, it can hardly be urged that a predisposition on the part of the jury to connect the petitioners with the other applicants was not developed by the course of the testimony. We repeat that the Court had charged the jury that the acts and declarations of any co-conspirator were the acts and declarations of every other co-conspirator, including the petitioners (1249).

ARGUMENT

I

The Court below erred in sustaining the judgments of conviction upon an indictment which charged one conspiracy where the proof conclusively showed "eight, or perhaps more" conspiracies and where, in submitting the case to the jury, the Trial Court either required or authorized the jury to find that only a single conspiracy existed. (Discussion of questions presented Nos. 1-2-3-4-5-9-10.)

A. *The Indictment*

Article 6 of the Amendments to the Constitution of the United States provides the inflexible rule that in all criminal proceedings the accused must "be informed of the nature and cause of the accusation" made against him.

No one can say that the indictment in this case charges anything other than a single conspiracy embracing 32 defendants and covering acts over a period of approximately

three years (2-3). The Circuit Court has held that instead of the single conspiracy charged in the indictment, the proof developed at the trial showed the existence of "eight or perhaps more" separate and distinct conspiracies (1295). It thus appears that before the trial began the petitioners were deprived of their constitutional right to be informed of the "nature and cause of the accusation" made against them. The United States attorney who drew the indictment well knew, or should have known, since Brown was his principal witness, that the indictment was a camouflaged instrument and that in fact, proof at the trial would show not one, but many conspiracies (*U. S.* v. *Perlstein*, 120 Fed. (2) 276, 283).

B. *The Proof*

During the trial, when various motions were made with respect to the admission of testimony involving persons other than the petitioners, the error in the drawing of the indictment was carried another step forward by the Court's admission of this testimony, upon the theory that anything done or said by any conspirator named in the indictment was admissible against the petitioners. This ruling was held by the Circuit Court to have been error. The Circuit Court stated that the Trial Judge was plainly wrong (1296). This was no question of a variance which arose during the trial as a surprise.

"The prosecution however, familiar with the proceedings before the Grand Jury, with the statements of the witnesses, with the exhibits and all the provable facts of its case against each of the defendants must have known * * *" that petitioners were not connected with all these separate

conspiracies (*United States* v. *Perlstein*, 120 F. (2d) 276, 283). It is axiomatic that an illegal agreement is the gist of the crime of conspiracy (*Pettibone* v. *United States*, 148 U. S. 197, 203; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443). Here there existed not one agreement, but, as the Circuit Court said, "eight, or perhaps more" separate and distinct agreements (1295). When motions to compel an election between the various conspiracies were made, they were denied because the Trial Court had the opinion that only one conspiracy was shown. In this connection the Circuit Court said of the Trial Judge that "he was plainly wrong in supposing that upon the evidence there could be a single conspiracy; and in the view which he took of the law, he should have dismissed the indictment" (1296).

In fact, if the indictment had been fairly drawn, the Trial Judge "would have applied the doctrine of *McElroy* v. *United States*, 164 U. S. 76, and compelled the Government to elect" the conspiracy it desired to have the jury pass upon (*Perlstein* v. *United States*, 120 F. (2d) 276, 283).

Thus, from the very inception of the prosecution, whether by accident or design, petitioners were deprived of their basic constitutional rights.

A further study of the record indicates that there was no possibility or hope on the part of the prosecutor to connect all these "eight, or perhaps more" transactions into a single composite conspiracy. When Brown's cross-examination was ended it was clear that Brown's dealings with the other seven or eight groups were confined in each instance to a separate group, and that there was no connection whatever between one group and the other. All this the Circuit Court has recognized and stated in its opinion (1295-6-7).

The trial took many weeks. During that time the evidence of Brown's dealings with the other 29 defendants covered many hours and pages of testimony. Every time objection was made upon the ground that this testimony of dealings with others was not binding on petitioners, the objections were overruled upon the theory that since there was only one conspiracy charged, any act or declaration by any defendant was binding on the petitioners.

These rulings the Circuit Court has held as error. Speaking of the Trial Judge on this point, the Circuit Court said (1296-7):

> "He was apparently misled by an erroneous understanding of the rule that, when anyone joins an existing conspiracy, he takes it over as it is, and becomes a party to it in its earlier phases, and that the declarations of other conspirators, even though made before he has entered, are competent against him. What he failed to remember was that to bring this rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with another person even though they be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations are no different from other acts; they become competent only when they are uttered in order to accomplish the common purpose. In the case at bar, we assume that Lekacos and Kotteakos and Regenbogen knew that Brown was for the time being acting as a broker for a number of other persons, who were getting loans in fraud of the Act, and who were making false

representations to the bank like those which they themselves were making. But that was not enough to make them confederates with the other applicants; it did not give them any interest in the success of any loans but their own; there was no interest, no venture, common to them and anyone else but Brown himself."

C. *The Charge*

When all of the evidence was in, and the Trial Court undertook to charge the jury, the error was further intensified. The Trial Court said:

> "Were all of these defendants moved by a *common purpose* to get money by violating the law of the United States, to borrow from the banks, and the United States, who insured the deposits? That is the question" (1248). (Our emphasis.)

Speaking of the conspiracy the Trial Court said:

> "*You cannot divide it up.* It is *one* conspiracy and the question is whether or not each of the defendants, or which of the defendants are members of *that* conspiracy" (1245). (Our emphasis.)

At another point in the charge the Trial Court went on to say that:

> "The test is whether or not what they were doing was in furtherance of, and for the purpose of, accomplishing the conspiracy, not that they were successful—get that straight—but whether what they did was done in furtherance of, and for the accomplishment of a *common* purpose" (1248). (Our emphasis.)

The Circuit Court said that the Trial Judge "was plainly wrong" (1296). However, the error did not stop at this point. The charge went on to say:

> "If you find that there was a conspiracy and that any of these defendants were members of that conspiracy, then the acts or statements of any of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against all of the defendants whom you so find to be members of the conspiracy" (1249).

Now the picture was complete as far as the jury was concerned. The Court had ruled, as a matter of law, that there was one conspiracy. Evidence of what any defendant in the case had said or done was admissible against the petitioners. And the petitioners were bound by the acts and declarations of any defendant whom the jury might believe to be guilty of crime.

At this point we pause to say that a number of defendants pleaded guilty before the trial, others were found guilty, and in each instance, under the Court's ruling, whatever these persons may have said and done in connection with their own illegal transactions with Brown, was to be binding on petitioners.

It is fundamental that no one can be convicted of any crime other than the one for which he stands indicted. Either that crime is proven, or none at all. We urge that when a Judge's charge in effect instructs the jury that they are at liberty to convict a defendant charged with one conspiracy on the basis of proof of crimes or conspiracies committed by other persons, that such charge constitutes fundamental error and is without doubt flagrantly at odds with our basic concepts of criminal jurisprudence, and must not be permitted to stand.

D. *Overt Act*

Another point which stands out in bold relief is the necessity of proving an overt act in order to vitalize a conspiracy, under Section 88, Title 18 U. S. Code. On this subject the Court charged the jury that "at least *one* overt act must be proven" (1250). Not *one* overt act in the conspiracies in which the Circuit Court said the proof showed petitioners might have been involved, but *one* overt act in any of the conspiracies, the "eight, or perhaps more" conspiracies said by the Circuit Court to have existed in the proof in the case. Under these circumstances, the question is squarely presented to this Court whether under a charge permitting proof of one overt act in the non-existent conspiracy, a conviction may be sustained against these three petitioners.

E. *Errors and Effect Thereof*

It is shocking to find that even though all of the foregoing errors were found and conceded in the Circuit Court's opinion, that the judgments of conviction were nevertheless affirmed. This was not the simple case of variance set forth in *Berger* v. *United States* (295 U. S. 78). Here there was a complete denial of justice and the absence of a fair trial according to the constitutional standards. As the record definitely shows, had the Trial Judge found, as the Circuit Court held, that there were "eight, or perhaps more" separate conspiracies, it is likely that he would have dismissed the indictment. If the Court felt that there were "eight or perhaps more" conspiracies, it is reasonable to assume he would have followed the procedure laid down in *United States* v. *Andolschek,* 2nd Circuit (142 F. (2d)

503, 507) where the District Court was advised that "care should of course be taken to confine the evidence of each conspiracy to the conspirators concerned." Certainly, if the Trial Judge had not been mistaken in his impression of the facts, then he would not have committed the errors of law, and since the verdict of the jury was based upon these presently established errors of law and fact, reason compels a finding that the judgments of conviction should not be permitted to stand.

Error having thus been definitely established, there remains for determination the question of whether it can be disregarded, pursuant to the provisions of Section 391 of Title 28, U. S. Code. There are two types of errors: One is technical and the other fundamental. The errors in our case are certainly not merely technical. They affect the very substance and form of a fair trial.

As this Court said in *Bruno* v. *United States*, 308 U. S. 287, 294, Section 391 of Title 28 U. S. Code was "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." In the *Bruno* case this Court was speaking of an implied direction of Congress concerning the privilege of an accused not to testify. It reversed the judgment of conviction where the error consisted in not charging as requested. In our case, where the error contravenes the express mandate of the Constitution—the right to due process of law—(The Fifth Amendment) it would be improper to disregard it. The Act above referred to (Section 391, Title 28 U. S. Code) certainly does not apply here, because the error is not merely technical and touches upon more serious matters than those described in the *Bruno* case as being within the puryiew of the Act.

Irrespective of whether the error is technical, the fact remains that Section 391 of Title 28 U. S. Code does not change the rule that where substantial rights of a party are affected, reversal must follow. (*McCandless* v. *United States*, 298 U. S. 342, 347; 348.) In the same connection, see *United States* v. *Sprengel*, 103 F. (2d) 876, 884, Third Circuit.

F. *Error in Circuit Court Ruling*

The Circuit Court said that the Trial Judge had instructed "the jury that they must find there was one conspiracy, or that they should acquit all" (1299). This, as we have shown, was error. Direct requests to charge in this very language were refused (1265, Posner's requests Nos. 11 and 12, page 1265. See exceptions at 1259).

Far from authorizing the jury to acquit all of the defendants if the jury found that there was more than one conspiracy, the Trial Judge in effect admonished the jury that there was only one conspiracy in the case, that "you cannot divide it up" (1245, exception taken to this language 1258, 1259) and that the only question which remained for the jury's consideration was the identity of those involved in that *single conspiracy* (1245).

Assuming that by the charge the jury was left with the task of determining whether one or more conspiracies existed, the dominant fact remains that the very authorization to find that a single conspiracy existed, carried with it the further authorization—under the given circumstances—to convict a defendant upon proof of commission of an overt act in another conspiracy by another defendant. Thus the gravamen of our objection remains constant

whether the Trial Judge be deemed to have merely authorized or to have required the jury to find the existence of a single conspiracy.

We must bear in mind that as we have shown, under "Evidence" the thread of circumstance that linked up the various defendants tended to predispose the jury to connect the members of one group with those in the others. Indeed, such predisposition was operative with the Trial Judge, himself, as the Circuit Court recognized when it stated in its opinion, "All this evidence the judge admitted because he believed that it was relevant to the proof of a single conspiracy although the accused objected, and demanded that only the evidence which was relevant to the applications of any one group should be admitted against that group" (1296).

It is conclusively presumed that the jury followed the Court's instructions. If the instructions were what the Circuit Court said they were, then by not acquitting all the jury must have found that only one conspiracy was proven. This, of course, is directly contrary to the Circuit Court's holding that "eight, or perhaps more" conspiracies were shown.

II

The quantitative disparity between one conspiracy charged and eight or more proved, in itself constitutes prejudice. (Discussion of questions presented No. 6.)

It is respectfully submitted that the opportunity for confusion and prejudice resulting from a variance between the one conspiracy charged, and those proved, varies directly with the number of conspiracies actually indicated to have existed. Certainly the fact that this Court decided

that the jury probably was not misled by a variance between one conspiracy charged, and two proved (*Berger* v. *United States*, 295 U. S. 78), furnishes neither principle nor authority to sustain a like decision where the variance, as in our case, is the vast one between a single conspiracy charged and a multitude of heterogeneous conspiracies proved.

Is there to be no restriction or limitation upon the privilege of the prosecution to take the greatest diversity and multiplicity of conspiracies, arbitrarily designate them as a single conspiracy, and depend upon this Court's decision in the *Berger* case for sanction and absolution? Clearly a point is reached where a jury is first impressed and finally overwhelmed by the very bulk of the inculpatory evidence against a seemingly endless succession of co-defendants. The reasonable doubt that the jury might have entertained of the guilt a particular individual can hardly be expected to withstand the ever incoming tide of incriminating testimony against the host of defendants, particularly when the jury is admonished that the individual defendant is bound by the acts and declarations of all. Under said circumstances, can it reasonably be expected that a jury will properly allocate the proof when the Court failed to do so? The answer must be in the negative.

When will we reach the ultimate? At what point will the conscience of the Court be shocked, and when will prosecutors be stopped from making it almost impossible for defendants to have their cases reviewed on appeal. There is more than meets the naked eye to this question of joining several crimes together with one indictment. In *United States* v. *Berger*, *supra*, there were two conspiracies. In *United States* v. *Liss* (137 F. (2d) 995, cert. den. 320 U. S. 773) there were three conspiracies. In *United States* v. *Cohen* (145 F. (2d) 82) there were likewise three conspira-

cies. In our case we have leaped to eight or more. At what point will we stop? There must be a limit. A reason for the procedure approved to date has been that it was economical. This reason itself is at war with our constitutional tenets, and the cost of prosecutions is no reason for depriving accused persons of their rights. We assume that another reason is the cost of a retrial. What we have said with regard to the first reason can be repeated here with the same force and effect. The Circuit Court of Appeals for the Second Circuit has apparently adopted a rule of error, as a result of which the Court looks back at the trial record to determine whether or not, in the light of all of the evidence offered, substantial justice was done and prejudicial error was avoided.

No one can tell what item of evidence ultimately moved a jury to reach a certain conclusion. On the other hand, and far outweighing all of the foregoing reasons for permitting this basically improper procedure, is the effect of the rule on accused persons. An impecunious defendant charged in such a gigantic conspiracy, usually finds himself unable to retain experienced counsel, because it becomes obvious, from a mere examination of the indictment, that the trial of the issues will take a long time. Secondly, in the event of a conviction, appeals to the Circuit Court of Appeals become almost impossible, because many persons, unable to take a pauper's oath, are nevertheless put into the position where it is impossible for them to perfect the record and present the questions to the Circuit Court.

Moreover, the magnification of the small conspiracy in which any particular defendant is involved into the fictitious single conspiracy of vast extent, with its far greater potentiality of harm, must necessarily have an inflammatory influence upon the jury. Thus, precedents relating to a vari-

ance between a single conspiracy charged and two conspiracies proved and denying prejudicial effect in such cases, do not sanction a variance between a single conspiracy charged and eight or nine proved. The very quantitative difference in the latter case in itself represents substantial prejudice.

III

The Circuit Court erred in holding (a) that the "several conspiracies" could have been joined in one indictment and (b) that several conspiracies with only one member common to all, could be properly joined. (Discussion of questions presented No. 7.)

The Circuit Court in its opinion stated that, in the case at bar, the "several conspiracies could have been joined as separate counts in one indictment * * *" (1297). As authority for this proposition, the Court cites several cases previously decided by it, and *United States* v. *Tuffanelli*, 131 F. (2d) 890 (7th Circuit). We respectfully urge, however, that the Circuit Court was mistaken in holding that the Seventh Circuit deems it proper to join different offenses of several defendants requiring different proof. In the *Tuffanelli* case, the majority of the Court stated (893-894):

> "District Attorneys, in drafting indictments, ought to keep in mind the admonition of the Courts that it is not good practice to join in an indictment counts charging different offenses against separate defendants. Todd v. U. S., supra [48 Fed. 2nd 530, 5th Cir.] and Culjak v. U. S., 9th Cir., 53 F. 2nd 554, 82 A. L. R. 480."

We thus see from the *Tuffanelli* case and the cases cited, that the Seventh Circuit, the Fifth Circuit and the Ninth

Circuit disapprove of the joinder of different offenses against different defendants, and recognize such rule as firmly established. To the same effect, see also *Castellini* v. *U. S.*, 6th Cir. 64 F. (2nd) 636, 637, 638, where the Court cites such elements as the length of the trial; the size of the record, and the fact that only part of the evidence relates to a single charge as reason for enforcing the rule that there should be no such joinder as the Circuit Court has held would be proper.

Thus, the Circuit Court has erred in its underlying assumption that the case of *McElroy* v. *U. S.*, 164 U. S. 76, 81, with its statement that "joinder cannot be sustained where the parties are not the same", has been overruled or that its authority is not recognized and followed in all other circuits, and particularly by this Court.

IV

Assuming that such joinder (see III) were proper, the Circuit Court erred in holding that the situation created by the variance herein is the same as though there had been such joinder. (Discussion of questions presented No. 8.)

Assuming, however, that it would be proper to have joined the various conspiracies in our case in a single indictment, the fact, nevertheless, remains that the permissibility of such joinder in no event disposes of the root and substance of our argument.

The situation in our case would be the same as in the case of joinder only if at the joint trial the Court had authorized the jury to convict a defendant of one count upon proof of another. We assume that no Appellate Court would countenance such an instruction. We urge again, that the

Trial Court's admonition to the jury that our case represented only a single conspiracy, taken together with the charge that the acts and declarations of one conspirator were binding on all, was tantamount to an instruction that one defendant involved in one conspiracy could be convicted upon the finding that an overt act had been committed by other persons in other conspiracies. Reversal is just as imperative as it would be if corresponding instructions were given in a case of joinder of counts.

Trial under an indictment which charges a single conspiracy, when actually several exist, can hardly be deemed the equivalent, in terms of fairness to the defendant, of a trial under an indictment consisting of a joinder of several counts. In the latter case the demarcation of offenses is shown in accordance with the facts. in the former the indictment is an instrument of camouflage that falls significantly short of the frank disclosure of charges to which the defendant is entitled.

CONCLUSION

The writs of certiorari should be granted.

Respectfully submitted,

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